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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER SESSION, 1974

No. 74-614

DONALD R. NANCE, II and THOMAS N. TILESTON,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

THEODORE F. SCHWARTZ
7701 Forsyth Boulevard
Clayton, Missouri 63105
Attorney for Petitioners

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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To the United States Court of Appeals for the Eighth Circuit

Donald R. Nance, II, and Thomas N. Tileston, your petitioners, respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause on September 20, 1974.

OPINION BELOW

The causes were argued before a division of the United States Court of Appeals for the Eighth Circuit. The division

rendered its judgment affirming Counts 2, 12 and 13 and reversing Counts 4, 5, 6 and 7. Petitioners were resentenced in accordance with the judgment.

JURISDICTION

The judgment of the U. S. Court of Appeals was entered on September 20, 1974 and filed in the District Court September 23, 1974. The jurisdiction of this is invoked under 28 U.S.C. § 1254(1), and Rule 37(c) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

I

Whether the Court erred in affirming convictions on Counts 2, 12 and 13 when the Court's opinion holds that a fraudulent scheme did not exist until early November 1971 and the subject letter of Count II as charged is March 21, 1971, Count 12, subject letter February 11, 1971, and Count 13, subject letter November 10, 1970.

II

Whether the Court erred in affirming the refusal of the trial Court to submit petitioners' "position instruction."

STATEMENT

This is an appeal from a prosecution by way of indictment for violation of Title 18, Section 1341. The indictment charged the Petitioners, Donald R. Nance, II, and Thomas N. Tileston,

with 15 counts, each count alleging a violation of Title 18, Section 1341. The indictment charged that the Petitioners organized Nance & Associates, Ltd. and caused said company to be incorporated in the State of Illinois on or about October 24, 1969. The Petitioners also organized and incorporated Photo Centers Limited, a Missouri corporation with its principal place of business in Hazelwood, Missouri. The companies were organized to sell to dealers merchandise racks for the sale of Tootsietoys, Bardahl Products and General Electric Photographic Supplies for sale to the general public. Petitioner Nance was involved in the organization of sales and promotions and Petitioner Tileston was charged with the responsibility of running the executive offices.

The company advertised for prospective dealers by placing advertising in newspapers throughout the country and would then mail brochures to persons who would inquire about prospective dealerships. Sales representatives for the company would then visit prospective dealers to discuss the purchase of one of Nance & Associates, Ltd. dealerships. After a person had entered into an agreement to purchase a dealership, the company would then send out representatives to obtain locations to place the merchandise for sale to the general public.

The Petitioners were convicted of Counts 2, 4, 5, 6, 7, 12 and 13 and sentenced consecutively to seven years imprisonment. They were found not guilty as to Counts 1, 3, 8, 9, 10, 11, 14 and 15. The Court of Appeals affirmed Counts 2, 12 and 13 and reversed as to Counts 4, 5, 6 and 7.

REASONS FOR GRANTING THE WRIT

I

The decision of the Court of Appeals is in conflict with its own finding that a fraudulent scheme did not exist until early November, 1971. The indictment and the date of the mailings clearly show that they took place prior to November, 1971.

II

The position instruction of the petitioners clearly set forth their defenses and the failure to give said instruction denied petitioners a fair trial.

I

The Decision of the Court of Appeals Is in Conflict With Its Own Finding That a Fraudulent Scheme Did Not Exist Until Early November, 1971. The Indictment and the Date of the Mailings Clearly Show That They Took Place Prior to November, 1971.

The Court of Appeals found as follows:

> "We conclude that the government did prove a scheme to defraud on the part of Tilesten and Nance but that such scheme was not proven to have originated at least until early November of 1971" (Opinion, page 5).

The Court letter changed in Count II of the indictment alleges a mailing on March 21, 1971. The Court letter in Count 12 of the indictment alleges a mailing on February 11, 1971. The allegation in the indictment for Count 13 alleges a November 10, 1970 mailing.

All of the above mailings took place prior to the November, 1971, date that the Court of Appeals has found to be the date the fraudulent scheme came into existence.

In *United States v. Schaeffer*, 299 F.2d 625, 7th Circuit, the Court stated:

> "Clearly, it is only when the mails are used in employing the scheme, that the scheme becomes a Federal crime. The use of the mails need not be central to the scheme but may be entirely incidental, United States v. Cashen, 281 F.2d 669, and the mail need not contain fraudulent representations, Criswell Keith v. Wilingham, 264 F.2d 76.
>
> 'Nevertheless, we hold that in order to sustain a conviction, the Government must show impact of the scheme on the investor, and that the mails were used in those instances where the impact occurred. To state our holding differently, even though a scheme to defraud in the sale of securities may have been operative on certain investors, if the sale of these same securities would be legal absent the employment of the scheme, and if the sales to those investors in which the use of the mails are charged are not tainted by the employment of the scheme, no offense has been proved. The Statute is clear in this regards; the mail must be used and *employed* the scheme however incidental the mailing may be'."

In *Estep v. United States*, 140 F.2d 40, at page 45, the Court, in reviewing the sufficiency of the evidence against a co-defendant, in mail fraud violation, stated, "There is no evidence reasonably tending to show that Estep originally devised the scheme to defraud, or form the conspiracy." The Court went on further to state, "But, without the knowledge, the intent cannot exist. Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal." *Direct Sales Company, Inc. v. United States*, 319 U.S. 703, 63 S.Ct. 1265.

The Court of Appeals has made a finding that is clearly inconsistent with their own opinion. The scheme did not exist until early November of 1971. The mailing alleged in Counts 2, 12 and 13 took place prior to the finding of the existence of the scheme. The Court cannot affirm a conviction for a period when no criminal intent is involved.

II

The Position Instruction of the Petitioners Clearly Set Forth Their Defenses and the Failure to Give Said Instruction Denied Petitioner a Fair Trial.

The Petitioners submitted instructions outlining their theory of the case and their defense to the indictment. Instructions E and F were submitted on behalf of Donald R. Nance, II and Thomas N. Tileston, and each instruction was as follows:

> "It is further the position of defendant, Donald R. Nance, II, that the companies began to lose money and that the defendant, Donald R. Nance, II, used his best efforts to continue the operations of the companies in order that said companies could perform on all agreements that had heretofore been entered into, but that in spite of all of the efforts exerted by defendant, Donald R. Nance, II, said companies were unable to operate successfully, and said companies suffered severe financial reverses, therefore causing non-delivery of some merchandise to prospective dealers."

The instruction for petitioner Thomas N. Tileston was identical to the aforementioned with the exception, of course, of the name change. The good faith issues raised by the offered instructions were certainly critical in the defense of the indictment.

In *United States v. Pihakis*, 224 F2d 898, at page 901, the Court commented on an instruction that was offered by the Defendant and refused and stated as follows:

> "Defendant was entitled to a clear charge upon this very important aspect of his defense and the failure of the Court below to give such a charge was in our opinion substantial prejudicial error."

The failure of the District Court in the instant case to submit Defendants' good faith instructions was clearly prejudicial. The failure to instruct was certainly not cured by any other instructions that the Court had given.

> "It is the position of the defendant, Donald R. Nance, II, that he entered into a new business venture and that in so doing he organized Nance & Associates, Ltd., an Illinois corporation and Photo Centers, Ltd., a Missouri corporation, and that both of said corporations were authorized to do business in the State of Missouri; that the principal business of said corporations was to sell and merchandise Tootsietoys, Bardahl products and General Electric photo supplies for resale through company placed rack display units. Defendant, Donald R. Nance, II operated said businesses in good faith and at all times intended to use his best efforts to cause said business enterprises to become successful operating entities and solicited prospective purchasers by advertising in newspapers for dealers, by sending prospective dealers complete sales brochures and information concerning self-service merchandising and by having sales representatives of same companies call upon said prospective dealers to sell to said prospective dealers dealerships in Tootsietoys, Bardahl products and General Electric photographic supplies.
>
> It is further the position of defendant, Donald R. Nance, II, that said dealerships were sold strictly in accordance with sales manuals pertaining to said products and that

no representations or promises other than those set out in said sales manuals were made to prospective dealers.

It is further the position of defendant, Donald R. Nance, II, that through his efforts said companies set up many dealerships throughout the United States; that said dealerships were all delivered their merchandise and that said Donald R. Nance, II, through the aforementioned companies performed completely on each and every contract.

It is further the position of defendant, Donald R. Nance, II, that on or about the first or second week of April, deliveries were delayed for an extended period of time as a result of a nation-wide teamster's strike and that after said strike, the said deliveries in accordance with the dealer contracts heretofore entered into was delayed, thereby causing some complaints for delay in delivery."

The Court of Appeals held that the offered instructions did not meet the standard of adequacy that a court may require (opinion page, infra, A-8).

The district court has the duty to fashion its instruction to fairly set forth the defense of the petitioner. The failure to do so removes the critical defense of good faith from the jury.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be granted or in the alternative to vacate the judgments of conviction and remand the cause for discharge of the petitioners.

Respectfully submitted

THEODORE F. SCHWARTZ
7701 Forsyth Boulevard
Clayton, Missouri 63105
Attorney for Petitioners

APPENDIX

APPENDIX A

United States Court of Appeals for the Eighth Circuit

No. 74-1047

United States of America,
Appellee,

v.

Donald R. Nance, II and Thomas N. Tileston,
Appellants.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: June 11, 1974

Filed: August 20, 1974

Before Lay, Heaney and Ross, Circuit Judges.

Ross, Circuit Judge.

This is a joint appeal by Donald R. Nance, II, and Thomas N. Tileston from a jury verdict finding them guilty of seven of the fifteen charged counts of mail fraud in violation of 18 U.S.C. § 1341. In each of the fifteen counts of the indictment Nance and Tileston were charged with use of the mail for the purpose of executing a fraudulent scheme involving the sale of distributorships for merchandise marketed on wire

rack displays. Guilty verdicts were returned on seven of those counts, specifically, 2, 4, 5, 6, 7, 12, and 13. Respecting each of those verdicts, Nance and Tileston argue that the evidence was insufficient to sustain a guilty verdict; that the court prejudicially refused to give the jury their "position" instruction; that the voir dire of the jury was prejudicially curtailed by the court; and that the jurors discussed the case among themselves before the final submission of the case, depriving defendants of a fair trial. We affirm the judgment of conviction as to counts 2, 12, and 13. We reverse as to counts 4, 5, 6, and 7.

Sufficiency of Evidence.

Nance and Tileston organized Nance and Associates, Ltd., and other corporations, to serve as a vehicle in the marketing of rack distributorships. Under the marketing concept adopted for the corporation, the two defendants negotiated to obtain distribution rights from the manufacturers of retail products: Tootsie Toys, manufactured by Strombecker Corporation; and Bardahl, manufactured by Bardahl Petroleum Products. Those manufacturers agreed to ship their products to the dealers procured by Nance and Associates, Ltd., upon receipt of advance payments from Nance and Tileston. The products were packaged by the manufacturers for display and sale on wire racks.

The solicitation of prospective dealers was accomplished by publishing offers to sell distributorship franchises in various newspapers. After a prospective dealer answered an advertisement, a letter by one of the defendants was generally sent to him acknowledging his inquiry. Thereafter a sales representative from Nance and Associates, Ltd., contacted the prospective dealer and delivered a sales pitch wherein it was represented that high quality sales locations would be obtained and continuous operations assistance and a brief training course

would be provided to dealers. Interested prospective dealers were then required to deposit $800, as earnest money, presumably to secure the dealership. Procurement of the dealership was eventually confirmed by mail. Under the contract between the dealers and the defendants, the latter were to promptly ship the inventory and racks and arrange for the locations in retail outlets. The route was to be established by the defendants' "marketing engineers" or location men. The dealer was to service the racks regularly and supply regular sales reports to Nance and Associates. All profit from the rack sales was to be retained by the dealer, with a commission payment retained by the retail outlet. The annual profit projections represented to the dealers by the defendants ranged from $5,000 to $10,000 and were set out in the advertisements and the sales manuals. The dealers were to reorder their inventory in the same fashion as the initial sale, by paying the defendants in advance, and the defendants were to have the merchandise shipped directly to the dealers.

At first the business functioned without serious problems. With the inception of a truck strike, however, in April, 1970, causing delays in shipment of inventories and racks, problems began to develop. By midsummer shipment schedules were considerably behind, partially, at least, because of the problems created by the strike. However, the evidence does not establish any deliberate failure to ship merchandise at that time. Beginning early in November, nevertheless, there is proof that cash payments were being received and not immediately applied to merchandise orders. By January, 1971, the Strombecker representative testified, Nance and Associates stopped sending checks altogether and the dealers no longer were receiving their original orders or reorders for which they had paid Nance and Associates in full.

The United States alleged in count 1 of the indictment, as false and fraudulent statements of material facts, that:

(a) Merchandise would be shipped to the dealer promptly after receipt of payment for the dealership.

(b) The dealers would receive substantial earnings promptly after commencement of the dealership.

(c) The dealers were guaranteed that their merchandise would be repurchased.

(d) The dealers would be assisted by trained personnel in establishing a merchandising business.

(e) The dealers would receive continuous operations assistance.

(f) That dealers were selected only after screening.

(g) Marketing specialists would obtain good locations for the sale of rack merchandise.

(h) Earnest money was required to reserve existing dealership route location.

Those allegations were incorporated by reference in each of the subsequent counts which charged violations of 18 U.S.C. § 1341 for each of the fifteen separate mailings to fifteen separate dealers. Nance and Tileston do not challenge the sufficiency of the indictment, but they do maintain that the proof was insufficient to sustain a conviction.

The essential elements of a violation of 18 U.S.C. § 1341 have been enunciated as "(1) a scheme conceived by appellant for the purpose of defrauding . . . by means of false pretenses, representations or promises, and (2) use of the United States mails in furtherance of the scheme." *Gold v. United States*, 350 F.2d 953, 956 (8th Cir. 1965). *See also Pereira v. United States*, 347 U.S. 1, 8 (1954). "Scheme" to defraud within the purview of this section involves some connotation of planning and pattern. *Fabian v. United States*, 358 F.2d

187, 195 (8th Cir.), *cert. denied*, 385 U.S. 821 (1966). Thus, intent to defraud is an essential element. It may be inferred by all the facts and circumstances surrounding a transaction. *United States v. Porter*, 441 F.2d 1204, 1210 (8th Cir. 1971), *cert. denied*, 404 U.S. 911 (1971). The "use of the mails" requirement has similarly been judicially construed. To bring the scheme within the ambit of the mail fraud statute, the mails must be used for the purpose of executing the scheme, *Kahn v. United States*, 323 U.S. 88, 93 (1944); must be employed before the scheme reaches fruition, *United States v. Maze*, 42 U.S.L.W. 4113 (January 8, 1974); yet, need not be contemplated as an essential element of the scheme, *Pereira v. United States, supra*, 347 U.S. at 8.

We have examined the entire record recognizing that the verdict must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it. *Glasser v. United States*, 315 U.S. 60, 80 (1942). In our opinion there was not sufficient evidence, as a matter of law, to sustain the government's position that a scheme to defraud was devised and implemented from the outset of the business operations of Nance and Associates. To be sure there were representations made which were likely to be misinterpreted by the individuals who purchased dealerships. But the government failed to produce evidence of specific misrepresentations indicating guilty knowledge and fraudulent intent at the outset of the business or immediately thereafter on the part of Nance and Tileston.

Viewing all of the evidence in the light most favorable to the government, including the permissible inferences flowing therefrom, we conclude that the government did prove a scheme to defraud on the part of Tileston and Nance but that such scheme was not proven to have originated at least until early November of 1971. This timing becomes important because the letters which are the subjects of counts 4, 5, 6, and 7 were

all mailed prior to the time the scheme was shown to have originated and those letters therefore cannot be said to have been for the purpose of executing the scheme or in furtherance of it. The convictions on those counts must be reversed. As to the remaining counts the evidence was sufficient. Count Two specifies a letter mailed by Tileston to a Mr. Douglass on March 21, 1971. It related to an original order from Douglass which was never forwarded to Strombecker and never received by Douglass despite payment in full to Nance and Associates in advance. Count Twelve specifies a letter mailed by Tileston to a Mr. Pace on February 11, 1971, in regard to reordering Bardahl products. Pace testified that he paid $301.48 in advance for additional Bardahl products but never received them. Count Thirteen specifies a letter dated November 10, 1970, from Nance to a Mr. Schultz encouraging Schultz to become a Bardahl dealer. Schultz bought a Bardahl dealership, paying the balance of $2,752.88 on January 4, 1971, and received nothing in return. His request for a refund was ignored.

The fact that Nance and Tileston did not personally authorize each mailing by the other is not significant. In *Isaacs v. United States*, 301 F.2d 706 (8th Cir.), *cert. denied*, 371 U.S. 818 (1962), a mail fraud case, this Court said:

> Each participant in a scheme to defraud is responsible for the use of the mails and wire used to execute and carry out the scheme.
>
> > " 'Where two or more persons jointly devise and execute a scheme to defraud by the use of the mails, they may thereby become in effect partners in the criminal purpose of so using the mails to defraud. If they do, the acts of each thereafter, during the existence and execution of the scheme, done in furtherance of that execution, may become the acts of all the partners, and each may be convicted of the mail-

> ing of a letter which one of his partners caused to be mailed in the execution of the scheme.' "

Id. at 726 (citations omitted).

For these reasons we conclude that the evidence is sufficient to sustain the verdict as to counts 2, 12, and 13, but not as to counts 4, 5, 6, and 7.

Position Instruction.

Fed. R. Crim. P. 30 provides that any party may file written requests that the court instruct the jury on the law set forth in the request. We have previously held, in this respect, a party is entitled to a specific instruction on his theory of the case if there is evidence to support it and a proper request for such an instruction is made. *Apel v. United States*, 247 F.2d 277, 282 (8th Cir. 1957).

Justification for resting the right to a position instruction upon the tender of a proper request has been summarized as:

> While lawyers are advocates, there is a duty to present the court with requests fashioned in a form suitable for use by the court, if it so desires.

8 J. MOORE, MOORE'S FEDERAL PRACTICE ¶30.03[1] at 30-5 (2d ed. 1973). *See also United States v. Bessesen*, 445 F.2d 463, 468 (7th Cir.), *cert. denied*, 404 U.S. 984 (1971). Here there was submitted a long, verbose instruction essentially setting forth a defense of good faith, yet containing also a detailed description of the purported evidence and inferences drawn therefrom by defense counsel. In our view the request did not meet the standard of adequacy that a court may require.

An additional reason for upholding the action of the trial court on this point is that even when a requested instruction

is properly tendered, the court is entitled to use its own language in framing instructions. *Wright v. United States*, 175 F. 2d 384, 388 (8th Cir.), *cert. denied*, 338 U.S. 873 (1949); 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 482 at 278 (1969). It is enough that the charge adequately and correctly covers the substance of the requested instructions. *Wright v. United States, supra*, 175 F.2d at 388. Thus when reviewing the adequacy of the instructions, an appellate court must look at the instructions as a whole, and the court's instructions considered as a whole, cannot be said to have ignored Nance and Tileston's request to state their position. The court made clear that a predicate to a verdict of guilty was that they find each defendant individually participated in a knowing and willful fraudulent scheme. The court's definition of those terms makes clear that good faith would be an absolute defense to the crime. While a more detailed position instruction would have been preferable, we cannot say that the instructions as a whole did not outline the theory of the government's case, the defendants' opposition thereto, and the applicable law.

Voir Dire.

Nance and Tileston submitted to the court ten questions to be asked on voir dire of the jurors.[1]

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[1] (1) Do you understand that the defendants are not responsible for unauthorized misrepresentations made by salesmen working for defendants' corporations, unless said defendants authorized, approved and acquiesced in said misrepresentations?

(2) Do you understand that evidence of business failure does not constitute fraud?

(3) Do you understand that the government must prove that the enterprise was set up in its inception to defraud persons?

(4) Do you understand that the failure to deliver merchandise as per agreement entered into between defendants' corporations and third parties does not constitute fraud?

While there was no record made of the voir dire, the only objection thereto was the court's failure to ask the submitted questions. A court has wide discretion in conducting the voir dire, Fed. R.Crim. P. 24(a), and need not probe for bias or prejudice by any particular number of questions in any particular form simply because requested to do so. *Ham v. South Carolina*, 409 U.S. 524, 527 (1973). Questions five and ten, if at all relevant, go to the ability of the jurors to render a fair and impartial verdict. No argument is proffered that the court did not otherwise exhaust inquiries relating to the juror's ability to render such a verdict. The remainder of the questions concern statements of law which are more appropriately dealt with in the instructions to the jury. *See United States v. Delay*, No. 74-1127 (8th Cir., July 30, 1974). Indeed, those matters were adequately covered in the final jury charge.

Juror Misconduct.

Finally, Nance and Tileston allege jury misconduct in their collective failure to observe the court's admonition not to discuss the case during the pendency of the trial. Placing reliance on *Winebrenner v. United States*, 147 F.2d 322 (8th

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(5) Will each juror require the same performance of the defendants' corporations as they would of any parties allegedly defrauded?

(6) Do you understand that the written contract between the parties represents the entire agreement of the parties?

(7) Do you understand that the misrepresentations, if any, must be of a present, existing fact and not a future representation?

(8) Do any members of the panel feel the defendants are guilty because they have been indicted?

(9) Do you understand that the indictment is not to be considered as evidence of guilt and raises no presumption of guilt?

(10) Does any member of the panel know Mr. John Mitchell, Mr. Richard Kleindienst, or Mr. Elliot Richardson?

Cir.), *cert. denied* 325 U.S. 863 (1945), they argue that they were deprived of a fair trial by the improper discussions among the jurors during the course of the trial.

In *Winebrenner* the court held that a trial court's instruction permitting jurors to discuss a case under submission to an extent that they did not form a definite fixed idea pertaining to the case required reversal due to the juror's premature consideration of evidence:

> The jury should not discuss the case among themselves because, first, they have not heard all of the evidence; second, they have not heard the instructions of the court as to how this evidence is to be considered by them, and neither have they heard the arguments of counsel. The crime here charged was not a common one with which the layman is more or less familiar, such as larceny or other well known common law crime, but it was a statutory crime more or less technical and intricate in its nature, with which the ordinary layman was wholly unfamiliar. For this additional reason the jury could not give intelligent consideration to the evidence without the assistance of the court's instructions.

Id. at 328. This case, of course, can be readily distinguished from *Winebrenner* since the court did not given an instruction which encouraged the jurors to discuss the case, but rather admonished them against discussing the case.

Fed. R. Crim. P. 51 provides that to preserve for review any acts or omissions of a trial court the party must "make known to the court the action he desires the court to take or his objection to the action of the court and the grounds therefor." In this case it was not until after the verdict was rendered that the matter was first drawn to the attention of the court. At the hearing on a motion for new trial an associate of defense counsel testified that immediately after the case was submitted

to the jury, the alternate juror, who was then excused, told defense counsel that the jury had been discussing the case throughout the trial. "A party may not stand idly by, watching the proceedings and allowing the Court to commit error of which he subsequently complains." *McNeely v. United States*, 353 F.2d 913, 917 (8th Cir. 1965). *See also United States v. Hester*, 489 F.2d 48, 50 (8th Cir. 1973).

An additional reason for our decision on this point is that this evidence, coming from counsel rather than from the juror is, of course, hearsay. The defense did not call any of the jurors themselves and question them about participation in any discussions during the course of the trial. Furthermore, the testimony of the defense associate counsel was to the effect that despite the alleged discussions, he was advised by the alternate juror that no juror had firmly made up his mind. A trial judge's decision against granting a new trial for juror misconduct will be overturned only for an abuse of discretion. *McDonnell v. United States*, 457 F.2d 1049, 1052 (8th Cir.), *cert. denied* 409 U.S. 860 (1972). Finding no proof of prejudice in the juror discussions, nor, indeed, any competent proof that such discussions took place, we cannot say that there has been any abuse of discretion by the district judge in denying the motion for new trial.

For the reasons hereinbefore set forth, the judgment of conviction is affirmed as to counts 2, 12, and 13, and is reversed and remanded as to counts 4, 5, 6, and 7.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

United States District Court
Eastern District of Missouri
Eastern Division

United States of America, Plaintiff, v. Donald R. Nance, II, and Thomas N. Tileston, Defendants.	No. 73 CR 212(2).

(Filed July 12, 1973)

The Grand Jury charges:

That from about October 24, 1969 and continuing until about July 1, 1971, within the Eastern District of Missouri, Eastern Division, and elsewhere, the defendants,

Donald R. Nance, II, and
Thomas N. Tileston,

did devise and intend to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, hereinafter more particularly set forth, from residents of the United States, hereinafter more particularly set forth, and other residents of the United States, hereinafter called "Dealers", who would and could be induced by the defendants to purchase for cash, dealerships for the rack sale of Tootsietoys, Bardahl Products and General Electric Photographic Supplies, well knowing at the time that the pretenses, representations and

promises would be and were false and fraudulent when made, which said scheme and artifice to defraud so devised and intended to be devised by the defendants was in substance as follows:

1. It was a part of the scheme and artifice that the defendants Donald R. Nance, II and Thomas N. Tileston did cause Nance & Associates, Ltd. to be incorporated in the State of Illinois on or about October 24, 1969, Photo Centers, Ltd. to be incorporated in the State of Missouri on or about March 17, 1971, and to transact business in the State of Missouri in offices located at No. 47 Village Square, Hazelwood, Missouri 63042.

2. It was further a part of the scheme and artifice that the defendants Donald R. Nance, II and Thomas N. Tileston dominated, directed and controlled the affairs of Nance & Associates, Ltd. and Photo Centers, Ltd. and sold and caused to be sold to dealers wire display racks and merchandise consisting of Tootsietoys, Bardahl Products and General Electric Photographic Supplies for resale from the said wire rack display units.

3. It was further a part of the scheme and artifice that the defendants would solicit prospective dealers by placing advertising in newspapers throughout the country, soliciting persons to become dealers for Tootsietoys, Bardahl Products and General Electric Photographic Supplies.

4. It was further a part of the scheme and artifice that upon receipt of a reply or inquiry from a prospective dealer responding to the solicitations of the defendants, the defendants would cause a letter to be sent through the United States Mails to the prospective dealer describing the dealership and the sale of merchandise on wire display racks.

5. It was further a part of the scheme and artifice that the defendants caused printed brochures to be sent through the

United States Mails to prospective dealers describing the business of merchandising by means of wire display racks.

6. It was further a part of the scheme and artifice that after the aforesaid mailing of the letter and brochure a salesman representative would personally visit the prospective dealer and would solicit an earnest money deposit from the prospective dealer and remit the same to the defendants.

7. It was further a part of the scheme and artifice that after receipt of the earnest money deposit by the defendants, the defendants would cause a letter to be sent through the United States Mails to the prospective dealer advising the prospective dealer that the dealership had been approved and requesting the payment of the balance of the purchase price for the dealership by means of a cashier's check, certified check or money order.

8. It was further a part of the scheme and artifice that the defendants opened accounts at the Lindbergh Bank, Hazelwood, Missouri, and deposited or caused to be deposited the checks, money orders and cashier's checks received from the dealers.

9. It was further a part of the scheme and artifice that the defendants would reject complaints received from the dealers and refuse refunds of money demanded by dealers.

10. It was further a part of the scheme and artifice to defraud and obtain money by means of false and fraudulent pretenses, representations and promises that the defendants did directly and indirectly make and cause to be made false and fraudulent statements of material facts, including, but not limited to, the following:

(a) Merchandise would be shipped to the dealer promptly after receipt of payment for the dealership.

(b) The dealers would receive substantial earnings promptly after commencement of the dealership.

(c) The dealers were guaranteed that their merchandise would be repurchased.

(d) The dealers would be assisted by trained personnel in establishing a merchandising business.

(e) The dealers would receive continuous operations assistance.

(f) That dealers were selected only after screening.

(g) Marketing specialists would obtain good locations for the sale of rack merchandise.

(h) Earnest money was required to reserve existing dealership route location.

11. That on or about June 20, 1970, in the Eastern District of Missouri, the defendants Donald R. Nance, II, and Thomas N. Tilestson, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, willfully and knowingly did place and cause to be placed in an authorized depository for mail matter a letter addressed to Edward Beauregard, Box 57, Auburn, New Hampshire 03032, to be sent and delivered by the Post Office Department of the United States.

In violation of Section 1341, Title 18, United States Code.

SECOND COUNT

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations in Count 1 of this indictment, except those contained in paragraph 11.

2. That on or about March 21, 1971, in the Eastern District of Missouri, the defendants Donald R. Nance, II, and Thomas N. Tileston, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, willfully and knowingly did place and cause to be placed in an authorized depository for mail matter a letter addressed to Ralph Douglass, 225 Springfield Street, Agawam, Massachusetts 01001, to be sent and delivered by the Post Office Department of the United States.

In violation of Section 1341, Title 18, United States Code.

THIRD COUNT

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations in Count 1 of this indictment, except those contained in paragraph 11.

2. That on or about December 24, 1970, in the Eastern District of Missouri, the defendants Donald R. Nance, II and Thomas N. Tileston for the purpose of executing the aforesaid scheme and artifice and attempting to do so, willfully and knowingly did place and cause to be place in an authorized depository for mail matter a letter addressed to Byron A. Wiley, 2508 N-E Terrace, Gainesville, Florida 32601, to be sent and delivered by the Post Office Department of the United States.

In violation of Section 1341, Title 18, United States Code.

FOURTH COUNT

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations in Count 1 of this indictment, except those contained in paragraph 11.

2. That on or about April 7, 1970, in the Eastern District of Missouri, the defendants, Donald R. Nance, II, and Thomas N. Tileston, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, willfully and knowingly did place and cause to be placed in an authorized depository for mail matter a letter addressed to Mr. Arthur Lund, 1810 North 4th Street, Grand Junction, Colorado 81501, to be sent and delivered by the Post Office Department of the United States.

In violation of Section 1341, Title 18, United States Code.

FIFTH COUNT

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations in Count 1 of this indictment, except those contained in paragraph 11.

2. That on or about March 30, 1970, in the Eastern District of Missouri, the defendants, Donald R. Nance, II, and Thomas N. Tileston, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, willfully and knowingly did place and cause to be placed in an authorized depository for mail matter a letter addressed to Mr. Donald M. Hagood, 4105 Buttercup Lane, Colorado Springs, Colorado, to be sent and delivered by the Post Office Department of the United States.

In violation of Section 1341, Title 18, United States Code.

SIXTH COUNT

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations in Count 1 of this indictment, except those contained in paragraph 11.

2. That on or about November 2, 1970, in the Eastern District of Missouri, the defendants, Donald R. Nance, II, and Thomas N. Tileston, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, willfully and knowingly did place and cause to be placed in an authorized depository for mail matter a letter addressed to Mr. Philip O. Van Winkle, 2415 Hollywood Avenue, Norman, Oklahoma 73069, to be sent and delivered by the Post Office Department of the United States.

In violation of Section 1341, Title 18, United States Code.

SEVENTH COUNT

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations in Count 1 of this indictment, except those contained in paragraph 11.

2. That on or about July 21, 1970, in the Eastern District of Missouri, the defendants, Donald R. Nance, II, and Thomas N. Tileston, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, willfully and knowingly did place and cause to be placed in an authorized depository for mail matter a letter addressed to Mr. Arthur T. Paulsen, Route 1, Box 694, Otis, Oregon 97368, to be sent and delivered by the Post Office Department of the United States.

In violation of Section 1341, Title 18, United States Code.

EIGHTH COUNT

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations in Count 1 of this indictment, except those contained in paragraph 11.

2. That on or about November 2, 1970, in the Eastern District of Missouri, the defendants, Donald R. Nance, II, and Thomas N. Tileston, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, willfully and knowingly did place and cause to be placed in an authorized depository for mail matter a letter addressed to Mr. John A. Fernandez, 24 30th Avenue N.E., Hickory, North Carolina 28601, to be sent and delivered by the Post Office Department of the United States.

In violation of Section 1341, Title 18, United States Code.

NINTH COUNT

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations in Count 1 of this indictment, except those contained in paragraph 11.

2. That on or about December 7, 1970, in the Eastern District of Missouri, the defendants, Donald R. Nance, II, and Thomas N. Tileston, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, willfully and knowingly did place and cause to be placed in an authorized depository for mail matter a letter addressed to Mr. Davis A. Guilbault, 3000 Gentilly Boulevard, No. 173, New Orleans, Louisiana 70122, to be sent and delivered by the Post Office Department of the United States.

In violation of Section 1341, Title 18, United States Code.

TENTH COUNT

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations in Count 1 of this indictment, except those contained in paragraph 11.

2. That on or about August 17, 1970, in the Eastern District of Missouri, the defendants, Donald R. Nance, II, and Thomas N. Tileston, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, willfully and knowingly did place and cause to be placed in an authorized depository for mail matter a letter addressed to Mr. John H. Johnston, 2713 Colin Avenue, Louisville, Kentucky 40217, to be sent and delivered by the Post Office Department of the United States.

In violation of Section 1341, Title 18, United States Code.

ELEVENTH COUNT

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations in Count 1 of this indictment, except those contained in paragraph 11.

2. That on or about October 16, 1970, in the Eastern District of Missouri, the defendants, Donald R. Nance, II, and Thomas N. Tileston, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, willfully and knowingly did place and cause to be placed in an authorized depository for mail matter a letter addressed to Mr. J. H. McCann, Post Office Box 188, Tioga, Louisiana 71477, to be sent and delivered by the Post Office Department of the United States.

In violation of Section 1341, Title 18, United States Code.

TWELFTH COUNT

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations in Count 1 of this indictment, except those contained in paragraph 11.

2. That on or about February 11, 1971, in the Eastern District of Missouri, the defendants, Donald R. Nance, II, and Thomas N. Tileston, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, willfully and knowingly did place and cause to be placed in an authorized depository for mail matter a letter addressed to Mr. Lamar M. Pace, Wiregrass Bardahl, 611 South Cherokee Avenue, Dothan, Alabama 36301, to be sent and delivered by the Post Office Department of the United States.

In violation of Section 1341, Title 18, United States Code.

THIRTEENTH COUNT

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations in Count 1 of this indictment, except those contained in paragraph 11.

2. That on or about November 10, 1970, in the Eastern District of Missouri, the defendants, Donald R. Nance, II, and Thomas N. Tileston, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, willfully and knowingly did place and cause to be placed in an authorized depository for mail matter a letter addressed to Mr. B. G. Schultz, 1724 Chimney Swift Lane, West Columbian, South Carolina 29169, to be sent and delivered by the Post Office Department of the United States.

In violation of Section 1341, Title 18, United States Code.

FOURTEENTH COUNT

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations in Count 1 of this indictment, except those contained in paragraph 11.

2. That on or about May 20, 1971, in the Eastern District of Missouri, the defendants, Donald R. Nance, II, and Thomas N. Tileston, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, willfully and knowingly did place and cause to be placed in an authorized depository for mail matter a letter addressed to Mrs. Carolyn Hainlen, Route 2, Greentown, Indiana 46936, to be sent and delivered by the Post Office Department of the United States.

In violation of Section 1341, Title 18, United States Code.

FIFTEENTH COUNT

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations in Count 1 of this indictment, except those contained in paragraph 11.

2. That on or about May 6, 1971, in the Eastern District of Missouri, the defendants, Donald R. Nance, II, and Thomas N. Tileston, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, willfully and knowingly did place and cause to be placed in an authorized depository for mail matter a letter addressed to Mr. Ralph H. Griffith, Jr., 4206 Birmingham Road, Jacksonville, Florida 32207, to be sent and delivered by the Post Office Department of the United States.

In violation of Section 1341, Title 18, United States Code.

A True Bill.

/s/ J. J. SEIDEL, JR.
Foreman

/s/ JAMES E. REEVES
United States Attorney

APPENDIX C

United States Court of Appeals
For the Eighth Circuit

No. 74-1047 September Term, 1973

United States of America,
Appellee,
vs.
Donald R. Nance, II and Thomas N. Tileston,
Appellants.

Appeal from the United States District Court for the Eastern District of Missouri.

JUDGMENT

(Filed September 23, 1974)

This cause came on to be heard on the original files of the United States District Court for the Eastern District of Missouri and briefs filed by the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause, be, and the same is hereby affirmed as to counts 2, 12, and 13.

And it is further ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and is hereby reversed and remanded to counts 4, 5, 6, and

7, for proceedings consistent with the opinion of this Court this day filed herein.

August 20, 1974

(Seal)

A true copy:

Attest:

Robert C. Tucker
Clerk, U. S. Court of Appeals, 8th Circuit
September 20, 1974

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-614

DONALD R. NANCE, II, AND THOMAS N. TILESTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners assert that the judgment of the court of appeals is inconsistent with its opinion and that their "position instruction" should have been given.

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioners were convicted on seven counts of a fifteen-count indictment for mail fraud, in violation of 18 U.S.C. 1341. Each petitioner was sentenced to a term of five years' imprisonment on each count; these terms were partly concurrent and partly consecutive, making an aggregate term of seven years' imprisonment for each petitioner, with immediate parole eligibility under 18 U.S.C. 4208(a)(2). The court of appeals reversed as to four counts and affirmed as to the remaining three counts (Pet. App. A).[1]

[1]The reversal did not affect the aggregate imprisonment for each petitioner.

Petitioners, operating as Nance and Associates, Ltd., arranged with several companies to sell products on racks to be installed at different retail places of business. Petitioners then, by advertisement, solicited prospective deaers offering to sell distributorship franchises for the operation of the racks. Those who responded were mailed brochures by petitioners; these brochures represented that high quality sales locations would be obtained, that there would be continuous operations assistance, and that a brief training course would be given. Prospective dealers were required to deposit $800 as earnest money to secure the dealership, receipt of which eventually was confirmed by mail. Dealers were to reorder their inventory and pay for such orders in advance. Representations were made as to the profits to be gained by dealers. However, Nance and Associates, after accepting the earnest money and advance payments for orders, did not furnish the stock, locations, and assistance that had been promised (Pet. App. A, pp. A-1 to A-3).

1. The court of appeals held (Pet. App. A, p. A-5):

> Viewing all of the evidence in the light most favorable to the government, including the permissible inferences flowing therefrom, we conclude that the government did prove a scheme to defraud on the the part of Tileston and Nance but that such scheme was not proven to have originated at least until nearly November of 1971. * * *

Petitioners correctly point out that the opinion as originally handed down was inconsistent with the judgment, because the mailings involved in the three affirmed counts took place prior to November 1971. However, on December 6, 1974, the court of appeals correct-

ed "November of 1971" to read "November of 1970" (App., *infra*). In light of this corrected date, which accurately reflects the evidence before the court, the inconsistency of which petitioners complain no longer exists.

2. Petitioners also contend that the district court erred by declining to read to the jury their proposed instruction explaining their position. However, the district court gave an instruction adequately covering the substance of petitioners' proposed charge (IV Tr. 1018-1019, 1040-1045).[2] In these circumstances it was not error to decline to use petitioners' wording, which the court of appeals correctly characterized as "verbose" (Pet. App. A, p. A-17).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.

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[2]The government is lodging with the Court Volume IV of the trial transcript.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

74-1047 (Supreme Court No. 74-614)

September Term, 1974

UNITED STATES OF AMERICA,

APPELLEE,

vs.

DONALD R. NANCE, II
and
THOMAS N. TILESTON,

APPELLANTS.

Appeal from the United States District Court for the Eastern District of Missouri.

On the court's own motion it is now here ordered that our slip opinion filed in this cause on August 20, 1974, be, and it is hereby, amended nunc pro tunc to provide that the third line from the bottom of page 5 of the slip opinion be changed from its present language of ". . . at least until early November of 1971." so that the third line from the bottom of page 5 of our slip opinion now reads ". . . at least until early November of 1970."

December 6, 1974

A True Copy.

Attest: Robert C. Tucker

Clerk, U.S. Court of Appeals, 8th Circuit.